March 30 1871

Submitted on Briefs

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~325~~ 426

THE HARTFORD FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ETHAN SPENCER AND GALEN SPENCER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 6, 1869.

March 8 1871
Argued by
Mr. Merrick

SUPREME COURT OF THE UNITED STATES.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and sixty-eight, before Honorable David McDonald, judge of the district court of the United States for the district of Indiana.

ETHAN SPENCER AND GALEN L. SPENCER
v.
THE HARTFORD FIRE INSURANCE COMPANY of Hartford, Connecticut. } 1448.—Assumpsit.

Be it remembered that heretofore, to wit, on the 22d day of October, A. D. 1868, the plaintiffs, by Asa Iglehart and J. S. Moore, their attorneys, filed, in the office of the clerk of said court, their declaration in the above-entitled cause, in the words and figures following, to wit:

Ethan Spencer and Galen L. Spencer, partners, trading under the firm name and style of E. and G. L. Spencer, citizens of the State of Indiana, plaintiffs, complain of the Hartford Fire Insurance Com-
2 pany of Hartford, Connecticut, a foreign corporation resident in the State of Connecticut, defendant, who, being summoned to answer in the court of common pleas of Warrick County, Indiana, has obtained a transfer of her cause to this court, and has filed copies of the process and entered her appearance to this suit; for that, whereas heretofore, to wit, on the 17th day of November, 1866, at and in the town of Boonville, in said district, said defendant, by her secretary, president, and agent, made a certain policy of insurance; which was and is in the words and figures following, to wit:

"*Hartford Fire Insurance Company, Hartford, Conn.*

"Incorporated 1810. Charter perpetual.
"No. 841 $44 00.

"By this policy of insurance the Hartford Fire Insurance Company, in consideration of the receipt of forty-four $\frac{00}{100}$ dollars, do insure G. Spencer and D. W. Brown, of Boonville, Ind., to the amount of four thousand dollars for the term of one year, as follows, viz:

"On their stock of dry goods, hats and caps, boots and shoes, clothing, family groceries, and queensware, and such articles as are usually kept in such house. The above goods are contained on the first floor
3 of a two-story brick metal-roof storehouse situated on Main street, N. side of the public square, detached exact E., adjoining three two-story brick metal-roof storehouses W., adjoining one-story frame, occupied as liquor grocery, and that by a two-story brick. For a more particular description of the premises, reference is had to their application on file in this office, which is hereby made part of this policy. 1. Against all such immediate loss or damage sustained by the assured and their legal representatives as may occur by fire to the property specified, not exceeding, 2, the sum insured nor the interest of the assured in the property except as hereinafter provided, from the seventeenth day of November, eighteen hundred and sixty-six at 12.3 o'clock noon, to the seventeenth day of November, eighteen hundred and sixty-seven, at 12.4 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same made by the assured are received at the office of this company; it being covenanted, as conditions of this

contract, that this company may repair, restore, or replace the property lost or damaged on giving notice of such intention within sixty
4 days after receipt of proofs herein required, in which case the assured shall furnish plans and specifications of the property so lost or damaged; and that this company shall not be liable until the actual payment of the premium, nor by loss by theft at or after the fire, nor for loss occasioned by invasion, insurrection, riot, civil commotion, military or usurped power, nor for loss caused by lightning or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only; not only for loss or damage caused by removal of property from a building where there is no loss by fire, unless such removal was necessary to preserve the property, in which case the damage shall be borne by both parties in proportion as the whole sum insured bears to the whol value of the property insured, nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire; and there can be no abandonment to the company of the property insured. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy and a warranty by the assured; and if the as-
5 sured, in written or verbal application, makes any erroneous representations, or omits to make known any facts material to the risk, or if the assured shall have, or shall hereafter make, any other insurances on the property hereby insured without the consent of the company written hereon, or if the risk be increased by any means within the controle of the assured, or any change takes place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer or conveyance, or the policy is consigned without the consent of the company endorsed hereon, or if the assured is not the sole and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by a sole, unconditioned, and entire ownership and title, and is not so expressed in the written portion of the policy, or if gunpowder, phosphorus, naptha, benzine, petroleum, or crude earth or coal oils are kept on the premises, or if camphine, burning-fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one
6 time without written consent, or if the premises hereby insured become vacated by the removal of the owner or occupant for a period more than thirty days, without immediate notice to the company and consent endorsed thereon, or for neglect or deviation from the laws or police regulations made to prevent accidents from fires, then and in every such case this policy shall be void. This policy may be cancelled at any time at request of assured, the company retaining customary monthly short rates for time policy has been in force.

"It may also be cancelled at any time by the company on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy. In case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss under oath, stating the time, origan, and circumstances of the fire, the occupancy of the building insured or containing the property insured, other insurance if any, and copies of all policies, the whole value and ownership of the property, the amount of loss or damage; and shall produce the certificate, under seal, of a magistrate, notary public, or commis-

7 sioner of deeds nearest the place of the fire, and not concerned in the loss, or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged, and be examined under oath by any person appointed by the company touching
8 all questions by him deemed pertinent to the loss, and subscribe such examinations when reduced to writing; and a refusal to answer any of such questions shall cause a forfeiture of all claims under this policy.

"Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured and said company, shall be appraised by disinterested and competent persons, mutually agreed upon by the parties. When personal property is damaged, the assured shall put it in the best order possible, and make an inventory thereof, naming the quantity and cost of each article and upon each article. The damage shall be seperately appraised; and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half of the expense of appraisal; and until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. All fraud or attempt at fraud on the part of the assured shall cause a forfeiture of all claim under this policy; reinsurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby re-
9 ceived bears to the whole sum insured by the company reinsured; and in case of loss this company to pay pro rata at and in the same time and manner as the company reinsured. It is expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the laps of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding. N. B. Books of accounts, securities for money, evidence of debt, deeds, money, bullion, plate, jewels, medals, engravings, paintings, sculptures, ornaments, musical and scientific instruments, models, and curiosities are not insured unless particularly mentioned in this policy. This policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire Insurance Company at Boonville, Indiana.

"In witness whereof the said Hartford Fire Insurance Com-
10 pany have caused these presents to be signed by their president

and attested by their secretary, in the city of Hartford and State of Connecticut.

"TIMO. C. ALLYN, *President.*

"GEORGE M. COIT, *Secretary.*

"Countersigned at Boonville, Indiana, this 17th day of November, 1866.

"W'M J. L. HEMENWAY, *Agent.*"

Which said policy of insurance was by said defendant then and there delivered to said plaintiffs Galen L. and said Daniel W. Brown, who were then and there merchants trading and doing business under the name and style of "Spencer and Brown," whereby said defendant then and there, in consideration of the sum of forty-four dollars, which was then and there to them paid, did insure said Spencer and Brown, in the sum of four thousand dollars, against loss by fire upon their stock of goods, more particularly described in said policy, refference to which description is now here had.

And plaintiffs further say that afterwards, to wit, on the 29th day of October, 1867, said plaintiff Eathan having purchased from said Brown his interest in said stock of goods, said Spencer and Brown, with the assent of the defendant, sold, assigned, transferred, and delivered to the plaintiffs said policy of insurance by endorsement on the
11 back thereof in these words and figures:

"For value received, we hereby transfer, assign, and set over unto E. and G. L. Spencer, and their assigns, all our right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

"Witness our hand and seal this 29th day of October, 1867.

"SPENCER AND BROWN."

"Sealed and delivered in presence of—

"Witness:

"THO'S L. NAMNEY.

Which said assent of said defendant is evidence by the endorsement of said defendant, by William L. Hemenway, who was then and there the agent of said defendant, in these words:

"The property hereby insured having been purchased by E. and G. L. Spencer, the Hartford Fire Insurance Company consent that the interest of Spencer and Brown in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to.

"Dated at Boonville, Ind., this twenty-ninth day of Oct., 1867.

"W'M J. L. HEMENWAY, *Agent.*"

And plaintiffs further aver that afterwards, to wit, on the 17th day of November, 1867, said defendant, by her president, secretary, and agent, made, executed, and delivered to the plaintiffs a certain instrument in writing called a certificate, whereby, in consideration of
12 forty-four dollars of premium paid by said plaintiffs to the defendant, said policy of insurance was extended and continued in force for the term of one year, to wit, till the 17th day of November, 1868; which said certificate was and is in the words and figures following, to wit:

"*The Hartford Fire Insurance Company.*

"No. 662. BOONVILLE, IND., AGENCY,
"*November 17th*, 1867.

"Received of E. & G. L. Spencer, of Boonville, Ind., forty-four $\frac{00}{100}$ dollars, being the premium on four thousand dollars, insured under policy No. 841, which is hereby continued in force for one year, to wit, from the 17th day of November, 1867, until the seventeenth day of November, 1868, at noon; not rated until countersigned by the duly authorized agent of said Hartford Fire Insurance Company, at ———.

"TIMO. C. ALLYN, *President.*

"GEO. M. COIT, *Secretary.*

"Countersigned:

"W'M J. L. HEMENWAY, *Agent.*"

And by the making and delivery of said certificate the plaintiffs became, and were and continued to be, insured upon their said stock of goods in said policy mentioned up to the happening of the loss and damage hereinafter mentioned.

And the plaintiffs further say that afterwards, to wit, on the 28th day of January, 1868, they were the owners and in the possession
13 of the goods, wares, and merchandise in said policy mentioned, which were in said store in said policy mentioned, and which were of greate value, to wit, of the value of ten thousand dollars. And on the day and year last aforesaid said stock of goods, wares, and merchandise were wholly destroyed by fire, whereby the plaintiffs were damaged in the sum of ten thousand dollars; and the plaintiffs say that before and after said destruction of said goods by fire, as aforesaid, the plaintiffs kept and performed, on their part, all and singular the conditions and stipulations which, by the terms of said policy, they were required to keep and perform, to entitle them to recover the same of money mentioned in said policy. And the plaintiffs say that, after the destruction of said goods, as aforesaid, to wit, on the day and year last aforesaid, said defendant had notice of said destruction of said goods by fire, and the plaintiffs then and there rendered to the defendant the particular account and statement required by said policy, and produced the certificate by said policy required, and did and performed all the matters and things required by said policy to be performed by them in case of fire, and all and whatsoever was by the defendant required to be done and performed. And said defendant, afterward, to wit,
14 on said day, in consideration of the premises, promised to pay said sum of money in said policy mentioned; but, though often requested, has wholly neglected and refused to pay the same, to the damage of the plaintiffs in the sum of five thousand dollars, ($5,000;) wherfore they sue.

ASA IGLEHART and
ISAAC S. MOORE,
Att'ys for Plaintiffs.

And afterwards, to wit, at the November term of said court, on the 3d day of November, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Now comes the defendant by Hendrick, Hord and Hendricks, and

enter an appearance to the action; and the plaintiffs having heretofore filed their declaration, the defendant is ruled to plead by the 9th instant. And by consent, both parties have leave to take depositions in the counties of Warrick and Vanderburgh, upon notice, and subject to all just exceptions.

And afterwards, to wit, at the November term aforesaid of said court, on the 24th day of November, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following further proceeding
15 in the above-entitled cause were had, to wit:

On motion, it is ordered that the depositions filed herein be published.

And afterwards, to wit, at the November term aforesaid of said court, on the 2d day of December, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties by counsel; and the defendant now files the plea of the general issue in the words and figures following:

And the said defendant, by its attorneys in this behalf, comes and defends the wrong and injury, when, &c., and for plea herein says that it did not undertake and promise in manner and form as the said plaintiffs have in their said declaration above alleged. And of this they put themselves upon the country.

HENDRICKS, HORD AND HENDRICKS,
Att'ys for Def't.

And the plaintiffs doth the like.

ASA IGLEHART and
I. S. MOORE,
For Plaintiffs.

And afterwards, to wit, at the November term aforesaid of said court, on the 3d day of December, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

16 Now come the parties—the plaintiffs by Mr. Iglehart, and the defendant by Mess. Hendricks, Hord and Hendricks—and thereupon the defendant, by its attorneys, moves the court to suppress certain of the plaintiffs' deposition set forth in said motion. And the cause coming on to be tried, here comes a jury, to wit: Lazarus B. Wilson, James P. Southard, Charles Oswold, Samuel Beck, John M. Spencer, Frederick Smith, Thomas J. Donnes, Charles May, Patrick Jennings, John Liter, Abr'm Webster, and Charles John, who, being duly empanelled and sworn, and having heard the evidence, retire to the jury-room.

And afterwards, to wit, at the November term aforesaid of said court, on the 4th day of December, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the jury also come and return into the court the following verdict, to wit: "We, the jury, find for the plaintiffs, and assess their damages at the sum of four thousand one hundred and sixty-three dollars and thirty-three
17 cents, ($4,163 33.")

And afterwards, to wit, at the November term aforesaid of said court, on the 11th day of December, A. D. 1868, before the Hon. David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the plaintiffs move for judgment upon the verdict of the jury.

It is therefore considered by the court that the plaintiffs do recover of the defendant the said sum of four thousand one hundred and sixty-three dollars and eighty-three cents, ($4,163 83,) so as aforesaid assessed and found.

And the defendant now files a bill of exception herein, which is in the words and figures following, to wit:

And thereupon, upon motion of the defendant, a writ of error is allowed herein to said defendant to the Supreme Court of the United States upon the filing of a bond according to law, in the penalty of six thousand dollars, with sufficient surety to be approved by the court.

Here follows bill of exceptions:

1. Be it remembered that, on the trial of this cause before the jury, the plaintiffs read in evidence the policy of insurance mentioned
18 in the declaration, which policy contained, among other things, the following conditions and stipulations, to wit:

"If the assured shall have or shall hereafter make any other insurance on the property hereby insured, without the consent of the company written hereon, or if the risk be increased by any means within the control of the assured, or any change takes place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer, or conveyance, or the policy is assigned without consent of the company endorsed hereon, or if the assured is not the sole and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by a sole, unconditional, and entire ownership and title, and is not so expressed in the written portion of the policy, or if gunpowder, phosphorus, naptha, benzine, petroleum, or crude earth or coal oils are kept on the premises, or if camphine, burning-fluid, or if refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time without written consent, or if the premises hereby insured become vacated by the removal of
19 the owner or occupant for a period of more than thirty days, without immediate notice to the company and consent endorsed hereon, or from neglect or deviation from the laws or police regulations made to prevent accidents from fires, then and in every such case this policy shall be void."

Be it remembered that, on the trial of this cause, there was evidence given to the jury tending to prove that, at the time of the execution of said policy, the plaintiffs informed the defendant's agent, who transacted the business, that there were then among the goods insured a few kegs of gunpowder, which they (the plaintiffs) wished to retain among said goods, and retained the same; and that the said agent consented thereto, and told the plaintiffs that they might retain and retail said gunpowder accordingly. And there was evidence given to the jury tending to prove that the plaintiffs did so retain and retail said gunpowder till November or December, 1867, when the last of said powder was retailed and sold.

Be it also remembered that, on the trial of said cause, evidence was given to the jury tending to prove that about the day of April, 1867, the plaintiffs applied to the said agent of the defendant to

20 have the amount of the insurance of the goods mentioned in the declaration enlarged; that the said agent thereupon refused said application, but informed the plaintiffs that he was an agent also for the Evansville Insurance Company, and would insure for them in that company the further sum of two thousand five hundred dollars ($2,500) on said goods, to which the plaintiffs consented; and that thereupon, through the procuration of said agent, a further policy of insurance by said Evansville Insurance Company was accordingly issued to the plaintiffs for the sum of two thousand five hundred dollars ($2,500) on said goods.

And be it further remembered that it was proved that, on the 17th day of November, 1867, the said defendant, by and through the said agent of the defendant, executed to the plaintiffs a renewal and extension of the policy of insurance mentioned in the declaration, in the words and figures following, to wit:

"*The Hartford Fire Insurance Company.*

"No. 662. BOONVILLE, IND., AGENCY, *Nov.* 17, 1867.

"Received of E. and G. L. Spencer, of Boonville, Ind., forty-four dollars, being the premium on four thousand dollars insured under policy No. 841, which is hereby continued in force for one year, to wit, from the seventeenth day of November, 1867, until the seventeenth
21 day of November, 1868, at noon. Not valid until countersigned by the duly authorized agent of said Hartford Fire Insurance Company at .

(Signed) "GEO. M. COIT, *Secretary.*
"TIMO. C. ALLYN, *President.*

"Countersigned:

"W'M O. S. HEMENWAY, *Agent.*"

And be it further remembered that, after the said evidence was given, the court instructed the jury as follows, to wit:

1. That if the jury should believe, from the evidence, that at the time of the making of the policy of insurance sued on the plaintiffs notified the defendant, through her duly authorized agent, that the said kegs of gunpowder were then among the goods insured, and requested permission to retain the same among said goods and to sell the same by retail, and if the defendant, by said agent, then and there consented thereto, this would amount to a waiver of said condition touching the keeping of gunpowder with said goods, so far as relates to said kegs of gunpowder; and that in that case the keeping of the same among said goods for the purpose of retailing the same, by the plaintiff, is no defence to this action.

2. That if the jury should believe, from the evidence, that before the time of the execution of said renewal and extension of the policy
22 of insurance mentioned in the declaration, the defendant had notice, through her lawfully authorized agent, of the fact of the plaintiffs retaining among said goods, for sale by retail as aforesaid, said kegs of powder, and made no objection thereto, such renewal and extension would, under the circumstances, amount to a waiver of said condition touching the keeping of gunpowder, so far as relates to said kegs of gunpowder.

3. That is the jury should believe, from the evidence, that before the time of the execution of the said renewal and extension of the policy of

insurance mentioned in the declaration, the said defendant, through her duly authorized agent, had full notice of the execution and existance of the said policy of insurance issued by the Evansville Insurance Company, and that with such notice, and without objection, the defendant executed the said renewal and extension, and received and accepted the premium therefor, the jury ought to regard this as a waiver, on the part of the defendant, of the said condition touching the plaintiffs insuring the said goods in other companies; and in such case the procuring, by the plaintiff, of said policy of insurance from the said Evansville Insurance Company, would be no defence to this action.

23

To the giving of each of which said instructions the said defendant, at the time of the giving of the same, object. But the court overruled the objections respectively. To which opinion of the court, in overruling said objections, and in giving said instructions, respectively, the defendant then and there excepted, and prays this her bill of exceptions be signed and sealed by the judge, and be made a part of the record herein; which is done accordingly.

DAVID McDONALD. [SEAL.]

And afterwards, to wit, at the November term aforesaid of said court, on the 19th day of December, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now the said defendant comes and files a bond herein, with George Tousey, surety, and the same is approved.

And said bond is in the words and figures following, to wit:

24

Know all men by these presents that we, the Hartford Fire Insurance Company and George Tousey, are held and firmly bound unto Ethan Spencer and Galen Spencer in the sum of six thousand dollars, to be paid to them, their executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seal, and dated this day of December, A. D. 1868.

Whereas the above-named Hartford Fire Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the circuit court of the United States for the district of Indiana, at the November term thereof, 1868, against said Hartford Fire Insurance Company, and in favor of said Ethan and Galen:

Now, therefore, the condition of this obligation is such that if the above-named Hartford Fire Insurance Company should prosecute its said writ of error effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise in force.

25

The Hartford Fire Insurance Company, [SEAL.]
By GEORGE T. BISSELL, [SEAL.]
General Western Agent and Manager.
GEORGE TOUSEY. [SEAL.]

Signed and delivered by George Tousey in open court, Dec. 19th, 1868, and approved by the court.

J. D. HOWLAND, *Clerk.*

DISTRICT OF INDIANA:

I, J. D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the record and proceedings in the cause above entitled as fully as the same remain in said court.

In testimony whereof I do hereto set my hand & affix the seal of said court, at Indianapolis, this 9th day of August, A. D. 1869.

[SEAL.] J. D. HOWLAND, *Clerk.*

26 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and district of Indiana, greeting:

Because, in the record and proceedings as also in the rendition of a judgment in a plea which is in said court before you, between Ethan Spencer and Galen Spencer, (plaintiffs in said circuit court,) and the Hartford Fire Insurance Company, defendant, manifest error hath happened, to the great damage of said Hartford Fire Insurance Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be herein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washing-

27 ton on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness Honorable S. P. Chase, Chief Justice of the Supreme Court of the United States, this 11th day of December, 1868.

Sealed with the seal of said circuit court on the day last named.

[SEAL.] J. D. HOWLAND, *Clerk.*

28 UNITED STATES OF AMERICA:

To Ethan Spencer and Galen Spencer:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein the Hartford Fire Insurance Company is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David McDonald, judge of the district court of the United States for the district of Indiana, and, by virtue of his office, one of the judges of said circuit court.

December 19th, 1868.

DAVID McDONALD,
District Judge.

29 I return this process, having delivered a copy of the same to

Hon. Asa Iglehart, attorney of record in the said circuit court for said Ethan Spencer and Galen Spencer, this 23d day of December, 1868.

BEN. SPOONER,
U. S. Marshal,
By SAMUEL DAY, *Dep.*

Sum's	2 00
182 miles	10 92
Return	10
	$13 02

(Indorsement on cover:) No. 325. The Hartford Fire Insurance Company, plaintiff in error, vs. Ethan Spencer and Galen Spencer. Indiana C. C. U. S.

Filed 6th December, 1869.

IN THE

Supreme Court of the United States,

THE HARTFORD FIRE INSURANCE COMPANY, *Plaintiff in error.* *vs.* ETHAN SPENCER & GALEN SPENCER, *Defendants in error.*	Error to the Circuit Court for the District of Indiana.

ARGUMENT.

C. F. PECK, *Attorney for Plaintiff in Error.*

GEO. L. PADDOCK, *Of Counsel.*

Beach & Barnard, Steam Printers, 126 South Clark Street.

IN THE

Supreme Court of the United States,

THE HARTFORD FIRE INSURANCE COMPANY, *Plaintiff in error.*
v.
ETHAN SPENCER & GALEN SPENCER, *Defendants in error.*

Error to the Circuit Court for the District of Indiana.

STATEMENT.

MAY IT PLEASE THE COURT:

The case is briefly as follows:

On the 17th day of November, 1866, the plaintiff in error issued to defendants in error, the policy of fire insurance set out in the declaration. This policy appears to be in the usual form, and among other conditions contains the following: "If the assured shall have made, or shall hereafter make, any other insurance on the property hereby insured, without the consent of the Company written hereon * * * or if *gunpowder*, phosphorus, &c., &c. * * * are kept upon the premises without written consent * * * then and in every such case the policy shall be void." The time covered by this policy was one year, at the expiration of which period, viz. on the 17th

day of November, 1867, the plaintiff in error issued to defendants in error what is termed a renewal receipt, renewing the policy for the term of one year from that date, in the words and figures following:

[No. 662.]

THE HARTFORD FIRE INSURANCE COMPANY.

BOONEVILLE AGENCY, Nov. 17, 1867.

Received of E. & G. L. Spencer, of Booneville, Indiana, forty-four dollars, being the premium on four thousand dollars, insured under policy No. 841, which is hereby continued in force for one year, to wit., from the 17th day of November, 1867, until the 17th day of November, 1868, at noon; not valid until countersigned by the duly authorized agent of said Hartford Fire Insurance Company at ——— Signed,

GEO. M. COIT, Secretary.
TIMO. C. ALLYN, President.
WM. J. L. HEMENWAY, Agent.

It will be observed that both this renewal receipt and the policy are given under the hands of the principal officers, the President and the Secretary of the company, as well as of the local agent, who countersigned and issued them.

Between the date of the issue of the renewal receipt and its expiration, there occurred a loss by fire of the goods mentioned in the policy, and to recover for this loss the suit in question was brought. The result of that suit was a verdict and judgment in favor of defendants in error.

The record shows that at the time of the execution of said policy the plaintiffs below informed said Hemenway that there were among the goods insured, a few kegs of gunpowder, which they, said plaintiffs, wished to retain among said goods and retail, and that said Hemenway

consented thereto, and told plaintiffs that they might retain and retail said gunpowder accordingly. And there was evidence given to the jury tending to prove that said plaintiffs did retain and retail said gunpowder until November or December, 1867, when the last of the same was retailed and sold. Evidence was also given to the jury tending to prove that about the — day of April, 1867, the plaintiffs called upon said Hemenway and requested to have the amount insured upon the goods mentioned in the declaration enlarged; that said Hemenway thereupon refused such application, but informed the plaintiffs that he was also agent for the Evansville Insurance Company, and would insure for them in that company, the further sum of $2,500.00 on said goods, and that thereupon, through the procuration of said Hemenway, a further policy of insurance, by said Evansville Insurance Company, was accordingly issued to plaintiffs for the sum of $2,500.00 upon said goods.

THE INSTRUCTIONS.

The instructions complained of, and upon which error is assigned, are as follows:

"1. That if the jury should believe from the evidence that at the time of the making the policy of insurance sued on, the plaintiff duly notified the defendant through her duly authorized agent, that the said kegs of gunpowder were then among the goods insured, and requested permission to retain the same among said goods, and sell the same by retail, and if the said defendant, by said agent then and there consented thereto, this would amount to a waiver of said condition against the keeping of gunpowder with said goods, so far as relates to said kegs of gunpowder, and that in that case the keeping of the same among said goods for the purpose of retailing the same is no defense to this action.

2. That if the jury should believe from the evidence that before the time of the execution of the renewal and extension of the policy of insurance mentioned in the declaration, the defendant had notice, by her lawfully authorized agent, of the fact of the plaintiffs' selling among said goods, at retail as aforesaid, said kegs of powder, and made no objection thereto such renewal and extension thereof, under the circumstances, would amount to a waiver of said condition touching the keeping of gunpowder.

3. That if the jury should believe from the evidence, that before the time of the execution of the renewal and extension of the policy of insurance mentioned in the declaration, said defendant, through her duly authorized agent, had full notice of the execution and existence of said policy of insurance, issued by the Evansville Insurance Company,

and yet that with such notice and without objection, defendant issued said renewal and extension and received and receipted for the premium therefor, the jury ought to regard this as a waiver, on the part of the defendant, of the said condition, touching the plaintiffs insuring said goods in other companies; and in such case the procuring by said plaintiffs of such insurance from the said Evansville Insurance Company, would be no defense to this action.

The case turns upon the question of error, in the above directions to the jury. We hold that they do not state the law, and that for such error, the judgment of the Court below should be reversed.

I.

The error in these instructions, seems to us to proceed, from a neglect of the plain terms of tho contract, added to a misapprehension of the subject of fire insurance. Some attention to the means by which an extended insurance business, covering, perhaps, many States of our Union, must be administered, will reveal the fallacy of the assumptions, on which the instructions are based. It is of the deepest importance, not alone to the plaintiffs in error, but to owners of insurable property, to know whether the conditions in question, are valid and effectual, to the extent we claim, or whether they are liable to vanish into air, at the breath of prejudiced witnesses, who are able to destroy the writing by oral recollections of waivers and estoppels. If the latter alternative occur, then a new element of risk must enter into the contract: The danger that the desire of the agent for his commission, may lead

him to suppress or conveniently forget these conversations, and thereby leave the company helpless and ignorant, as to their purport. Or, that the agent, or insured, being human, may honestly misunderstand, or fail to remember. Or, that the insured may fabricate a waiver, or invent an estoppel for every fire. Or, again, that a dispute may arise between the local agent and the insured, as to what was really said between them. The quantity of this risk will be an unknown one, and, *omne ignotum pro magnifico*, rates will go up in proportion to the uncertainty. Public policy lies the other way; toward keeping them down.

It is easy, upon an easy view of the relations of the parties, to say: The agent, for the company, has received, this notice, and therefore the company has received it. This is better in sound than in sense; for the practical question is, will the agent give the company the full benefit of his knowledge? Experience shows that he will not, always; shows that the identity of the local agent with the company, and its interests, is often the merest of fictions. From the doctrine, that the local agent and the company, are the same person, the adverse argument proceeds, to the point that a verbal consent, is equivalent to a written one; and as valuable to the company, in the conduct of its business.

If this were a controversy between natural persons, there would be more weight in the reasoning; but as it is not, it seems to us quite plain, that an endorsement on the policy, becoming, as it does, a part of the records of the company, and preserving in a constant, unmistakable form, the fact in question, is more useful to the company, than the oral tradition would be, whether the tradition perished with the local agent or not. For this greater value we

have stipulated; and the other party have taken a policy, containing the condition for written consent, at a rate proportioned to the greater security that condition, if observed, would give us.

Necessarily, the affairs of insurance companies are directed from some central point, where the principal office is placed, and where can be had a general view of the whole field. Such general view can only be obtained by means of documents, letters and reports, or some other form of written message, regularly and methodically transmitted by the various local agents. Now here is the root of the matter: If these local agents are, by judicial interpretation, allowed to exercise a general and discretionary power, such as claimed for Mr. Hemenway, in this case, there is, and must be, an end of all general and efficient supervision and control over the business, at the office of the company. Once deprive the company, in the way proposed, of the written history of its transactions, and you render impossible any action, which has its origin in a knowledge of the facts that demand action. We have never intended to entrust to our local agents so great a dispensing power, as the setting aside of these conditions. What we have intended in that respect, and what we have held out to the world in that respect, can plainly be read in the policy itself. Can not it be understood that we stipulate for a writing, for the very reason, among others, that we do not choose to trust our interests in this matter, with our local agent? Could not the Messrs. Spencer perceive this?

Another erroneous impression not entirely confined to sympathetic juries, has been that the merchant who takes a policy is so far gone in a sort of mental incapacity and

plication must spring from some notice given Hemenway while acting as our agent, and not, as in the present case, from a knowledge acquired by him as agent for the Evansville Company. Of course, it is apparent that if the notice was not to our agent, as agent, at the date it was received, no lapse of time would add to its validity. Thus, at the date of the issuance of the renewal receipt, the immaterial fact appears, that the agent of the Evansville Company was aware that there was a prior insurance, and no notice of prior insurance is brought home to any agent of ours. And in discussing this point, we by no means concede that, if the information had been repeated to Hemenway, at the moment of countersigning and delivering the renewal, the legal result would have been different. Another consideration occurs to us at this part of the case. The real parties at interest are the stockholders who are to pay the loss in case of liability. Now the policy bears the names of three representatives of the Company, the President, the Secretary and the Local Agent, all of whom take part in fixing the measure of the insurer's liability. This being so, why should a parole notice to only one, and that one the least in rank of the three, be deemed a waiver of any clause whatever? In a legal point of view, are not all these the active agents in promising the insurance, and should not all be consulted, as to any waiver or modification of the writing? It follows, that the insured, from the very shape of the contract, has ample notice that in professing to waive the condition, if he did so profess, Hemenway was exceeding the power given him. The three officers had agreed that the waiver could be made only by indorsement; one of the three, as now claimed, has assumed to waive it in a mode contrary to the policy, and without the assent of his co-agents, who took part in framing it, as offered to the assured for acceptance.

The local agent, whose compensation is measured by the number and amount of the risks he takes, and is not diminished by the losses of his principal, is not a person who can be entrusted with a power of waiver of the benefits of such a condition as that under discussion. His sense of interest might lead him to suppress the fact of other insurance, and even without an actual intent to suppress, he may forget, and thus all benefit of the notice, which is the opportunity and privilege of cancelling the policy and terminating the risk as increased, may be lost to the company. It is vain to say that the law presumes that the agent does his duty and sends on the notice to the company. There are presumptions far stronger than this general one, that outweigh and rebut it. It ought to be a stronger presumption that when the insured omits so simple an act as the noting of the other insurance, under the circumstances of this case, he has some motive that he desires to keep from the insurer. And when the insured and the local agent act in concert, and the agent omits to note the other insurance, while the policy is under his hand, there should be no presumption that, at any future time, he will do otherwise than as he then does—remain silent.

III.

We submit, that taking the third instruction to be theoretically correct, there was no evidence to which it was applicable, inasmuch as Hemenway, at the time he took the other insurance, was acting for the Evansville Company, and not for plaintiff in error. In the printed copy of the bill of exceptions before us, it appears that the only occasion when the other insurance is mentioned to Hemenway, or by him, is after he had declined to carry it in our company, and even then only by way of promising the defendants in error what he *would insure* in the other company, which promise was fulfilled by him on behalf of the company concerned. We submit that this affair is as foreign to us and our rights, as if the other insurance had been effected, and the conversation held with any stranger on the street. But we have already alluded to this matter.

In addition to the case in 12 Iowa, we need only cite:

Angell and Ames', Corporations, §§ 306, 307.

Story on Agency, § 140 b.

Voee v. *Eagle Life and Health Ins. Co.*, 6 Cush. 42.

Smith v. *Ins. Co.*, 24 Penn. St., 320.

Sykes v. *Perry Co. Mut. Fire Ins. Co.*, 34 Penn. St., 79.

Schenck v. *Mercer Co. Mut. Ins. Co.*, 4 Zab., 447, 454.

Boggs v. *America Ins. Co.* 30 Mo., 63, 71.

Prest. &c. of Westfield Bank v. *Cornen*, 37 N. Y., 320.

Forbes v. *Agawam Mut. Ins. Co.*, 9 Cush., 470, 473.

Ayres v. *Hartford Fire Ins. Co.*, 17 Iowa, 187.

Keenan v. *Dubuque Mut. Ins. Co.*, 13 Iowa, 375.

Mellen v. *Hamilton Ins. Co.*, 17 N. Y., 609.

If we are to be concluded by the e verbal recollections of verbal declarations, made at such distant times and places, we humbly submit that it must appear, that the conversation happened at the time of the issuance of the policy, and was a part of the business relating to such issue.

I V .

The beginning and the end of the law of this case, expressed in the plain language of the contract is, that other insurance, not consented to in writing, on the policy, shall avoid the policy. The proposition we lay down, is a very simple one—it treats the contract as the law of the parties.

We are glad to note, that the question between ourselves and defendants in error, raised by these instructions, appears to have been settled in our favor, many years ago, by this Court, in the case of *Carpenter* v. *The Providence Washington Insurance Co.*, decided in 1842, and reported in 16 Peters, 496. As will at once appear, by reference to the report, the condition of the policy in the Providence case was, in substance, equivalent to the condition in our Hartford policy, as to other insurance. We quote from the report cited: "And provided, further, that in case the as-

"sured shall have already, any other insurance, on "the property hereby insured not notified to this corpo- "ration, and mentioned in or indorsed on this policy, then "this insurance shall be void, and of no effect." "And "if the said assured, or his assignees, shall hereafter make "any other insurance on the same property, and shall not, "with all reasonable diligence, give notice thereof to this "corporation, and have the same *indorsed on this instru- "ment, or otherwise acknowledged by them, in writing,* this "policy shall cease, and be of no further effect."

In the cited case, as in that now under discussion, an instruction was prayed to the effect that if the Insurance Company had notice in fact, by parol, of the other insurance, the condition was sufficiently complied with. The Circuit Court refused the instruction, and the judgment below having been for the company, the propriety of this refusal was a question necessarily arising in the case. It is remarkable that the instruction refused bears the precise number, and conveys the precise doctrine of the instruction on the same subject given by the Court below in the present case, for the defendants in error. The Supreme Court, by STORY, J., of this third instruction, say:

"The third instruction prayed the Court to instruct the "jury that it the Washington Insurance Company had no- "tice in fact of the existence of the policy in the Ameri- "can office, that was in law a compliance with the terms "of the policy. The Court refused to give the instruction "as prayed, but instructed the jury that at law, whatever "might be the case in equity, mere parol notice of such "insurance was not of itself sufficient to comply with the "requirements of the policy declared on; but that it was "necessary in case of any such prior policy that the same

" should not only be notified to the company, but should " be mentioned in or endorsed on the policy, otherwise " the insurance was to be void and of no effect. We think," add the Court, "this instruction was perfectly correct. " It merely expresses the very language and sense of the " stipulation of the policy; and it can never be said that " the stipulation in the policy is complied with, when there " has been so such mention or indorsement as it positively " requires, and without which it declares the policy shall " henceforth be void and of no effect."

If any distinction can be taken in this matter between the cited case and the present, it is that this case is a little stronger for the underwriter than that, inasmuch as express consent is required by our policy to be indorsed, and not alone the mere fact of other insurance. How otherwise does this branch of the case differ from the case cited?

The case of the Providence Company is a very well known one to the profession, having been selected by the editors of the American Leading Cases as one of that useful collection, and made the text of elaborate comment and annotation. It was an unanimous opinion, and if it has been overruled or questioned by any subsequent decision of the same Court, we are not aware of the fact.

And it may be well here to remark, that the same eminent jurist who delivered this opinion upholds the paramount authority of the federal judiciary over contracts of insurance. Such contracts, it is said, (same case, p. 511,) are by no means local in their character, but present questions of general commercial law, and are not regulated by local policy or customs.

"Whatever respect, therefore," says Justice STORY, "the decisions of State tribunals may have on such a sub-"ject, and they certainly are entitled to great respect, they "cannot conclude the judgment of this court. On the "contrary, we are bound to interpret this instrument ac-"cording to our own opinion of its true intent and ob-"jects, aided by all the lights which can be obtained from "all external sources whatever; and if the result to which "we have arrived differs from that of these learned State "Courts, we may regret it, but it cannot be permitted to "alter our judgments." We respectfully submit that this language of the Court well describes the jurisdiction and powers of the federal courts over contracts of insurance, and sufficiently limits the authority of adverse cases de rived from reports of local tribunals.

Authorities fully sustaining the law of *Carpenter* v. *The Providence Washington Company*, are not wanting. Among these we respectfully refer the court and counsel to the following:

Barrett v. *Union Mutual Fire Ins. Co.*, 7 Cush., 175.

Forbes v. *Agawam Mutual Ins. Co.*, 9 Cush., 470.

Worcester Bank v. *Hartford Fire Ins. Co.*, 11 Cush., 265.

Conway Tool Co. v. *Hudson River Ins. Co.*, 12 Cush., 144.

Pendar v. *Am. Mutual Ins. Co.*, 12 Cush., 469.

Loehner v. *Home Mutual Ins. Co.*, 17 Mo., 256.

Hale v. *Mech.'s Mutual Fire Ins. Co.*, 6 Gray, 169-172.

Kimball v. *Howard Fire Ins. Co.*, 8 Gray, 33.

Jennings v. *Chenango Muutal Ins. Co.*, 2 Denio, 75.

We cite also—

Vandervoor v. *The Columbian Ins. Co.*, 2 Caines, 155.

Cheriot v. *Parker*, 2 Johns, 346.

Higginson v. *Dall*, 13 Mass., 96, 172.

Atherton v. *Brown*, 14 Mass., 152.

Weston v. *Emes*, 1 Taunt., 115.

Opinion of Tenterden, C. J., in *Flinn* v. *Tobin*, 1 Moody & Malk., 367.

1 Phillips on Ins., 5th Ed., Ch. 9. § 10, pp. 464 and 483, and Chap. 1, § 8, p. 47.

Hutchinson v. *Western Ins. Co.*, 21 Mo., 97.

Carpenter v. *Providence Washington Ins. Co.*, 6 Howard, 224.

Stark Co. Mutual Ins. Co. v. *Hurd*, 19 Ohio, 149.

Glendale Woolen Co. v. *Protection Ins. Co.*, 21 Com., 19.

V.

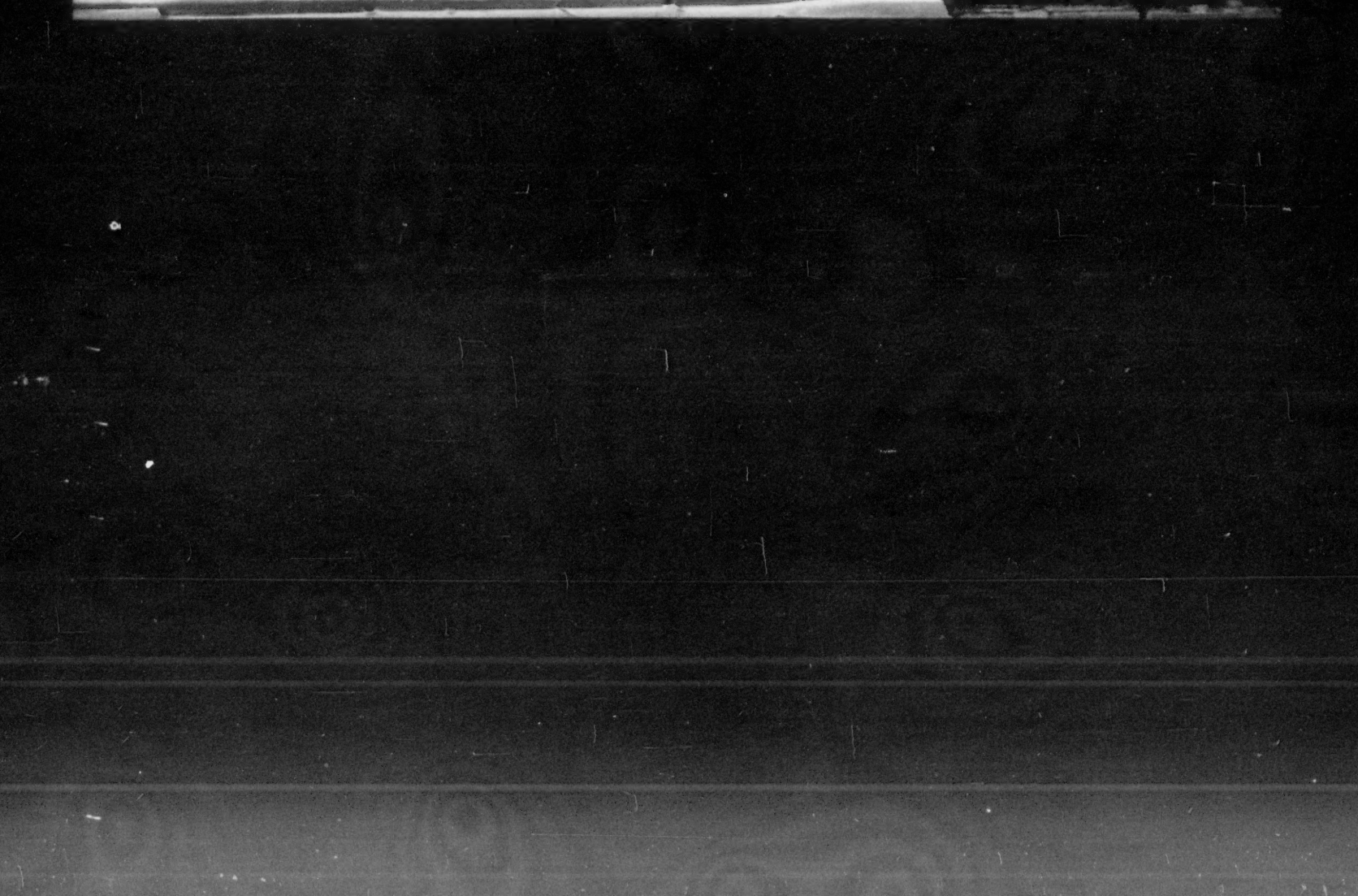
We have refrained from any extended remark as to the condition in regard to gunpowder; in part because we deem it not necessary in order to the presentation of the argument, and in part because we deem what we have said as applicable to that condition, as to the one relating to other

insurance. Although the proof may leave it doubtful whether any powder was in stock after the renewal, it yet appears that in November or December, 1867, some was on hand. If after Nov. 17, 1867 (and that, we think, is the fair reading of the record), then the question of a breach of the condition against keeping that article was before the jury. The first and second instructions are objectionable as directing the jury to find a waiver upon the facts supposed, even though they may have found the gunpowder to have been kept, as claimed by us.

And now, may it please your Honors, we submit this case to the judgment of the court. The stockholders, who are the parties really interested in that judgment, respectfully suggest that the doctrine put forth in the instructions of the court below are at variance with the long settled rule of this court in the case we have cited. For many years they have relied upon that rule as the law of the contract and the parties, and they rely upon it now. They feel that if the reasons for its adoption, to be found on the records of this court, in the opinion of Mr. Justice Story, may not unfortunately have lost their wisdom and force, there is every ground to trust that the judgment in the present case may be reversed by his successors.

C. F. PECK,
Attorney for Plaintiff in Error.

GEO. L. PADDOCK,
Of Counsel.



IN SUPREME COURT

OF

THE UNITED STATES.

THE HARTFORD FIRE INSURANCE COMPANY, *of Hartford, Conn.*, *Plaintiff in Error*,

vs.

ETHAN SPENCER AND GALEN SPENCER, *Defendants in Error.*

Error to the Circuit Court for the District of Indiana.

No. 126.

Brief for Defendants in Error

BY

JAMES HUGHES, of Counsel.

WASHINGTON, D. C.:
PRINTED BY WM. H. MOORE, 511 ELEVENTH ST.
1871.

In the Supreme Court of the United States.

THE HARTFORD FIRE INSURANCE COMPANY, *of Hartford, Conn., Plaintiff in Error,*
vs.
ETHAN SPENCER AND GALEN SPENCER, *Defendants in Error.*

Error to the Circuit Court for the District of Indiana.
No. 126.

This was an action of assumpsit by the defendants in error against the plaintiff in error, upon a policy of Insurance, which was issued on the 17th day of November, 1867, for one year, and renewed and continued in force by an instrument in writing for one year from its expiration. The policy and renewal certificate are both set out in the declaration. The defendants pleaded the general issue. There was a trial by jury, which resulted in a verdict and judgment against the insurance company for the sum insured, with interest. And to reverse this judgment, for alleged error in the instructions given to the jury upon the trial, this writ of error is prosecuted.

The policy set out in the declaration and given in evidence on the trial, contains among others the following conditions: "If the assured shall have made, or shall hereafter make, any other insurance on the property hereby insured without the consent of the company written hereon, * * * or if *gunpowder*, phosphorus, &c., &c., * * * are kept upon the premises without written consent, * * * then and in every such case the policy shall be void."

The evidence adduced upon the trial proved, that at the time of the execution of said policy the plaintiffs below informed the defendants' agent that there was among the goods insured a few kegs of gunpowder, which they, said plaintiffs, wished to retain among said goods and retail, and that said agent consented thereto and told the plaintiffs that they might retain and retail said gunpowder accordingly. And there was evidence given to the jury tending to

prove that said plaintiffs did retain and retail said gunpowder until November or December, 1867, when the last of the same was retailed and sold. Evidence was also given to the jury tending to prove that about the day of April, 1867, the plaintiffs called upon the agent of the defendant and requested to have the amount insured upon the goods mentioned in the declaration enlarged; that the agent thereupon refused said application, but informed the plaintiff that he was also agent for the Evansville Insurance Company, and would insure for them in that company the further sum of $2,500.00 on said goods, and that thereupon, through the procuration of said agent, a further policy of Insurance by said Evansville Insurance Company was accordingly issued to plaintiffs for the sum of $2,500 upon said goods. * * *

It was proved that on the 17th day of November, 1867, the defendant, by her and through said agent, executed to the said plaintiffs a renewal and extension of the policy of insurance mentioned in the declaration, as follows:

[No. 662.] THE HARTFORD FIRE INSURANCE COMPANY,
Boonville Agency, Nov. 17, 1867.

Received of E. & G. L. Spencer, of Boonville, Indiana, forty-four dollars, being the premium on four thousand dollars, insured under policy No. 841, which is hereby continued in force for one year, to wit: from the 17th day of November, 1867, until the 17th day of November, 1868, at noon; not valid until countersigned by the duly authorized agent of said Hartford Fire Insurance Company at ———

"GEO M. CORT," *Secretary.*
TIMO. C. ALLYN, *President.*
WM. J. L. HEMENWAY, *Agent.*

The instructions complained of and upon which error is assigned, are as follows:

"1. That if the jury should believe from the evidence that at the time of the making the policy of insurance sued on, the plaintiff duly notified the defendant through her duly authorized agent, that the said kegs of gunpowder were then among the goods insured, and requested permission to retain the same among said goods, and sell the same by retail, and if the said defendant by said agent then and there consented thereto, this would amount to a waiver of said condition against the keeping of gunpowder with said goods, so far as relates to said kegs of gunpowder; and that in that case the keeping

of the same among said goods for the purpose of retailing the same, is no defence to this action.

2. That if the jury should believe from the evidence that before the time of the execution of the renewal and extension of the policy of insurance mentioned in the declaration, the defendant had notice, by her lawfully authorized agent, of the fact of the plaintiffs' selling among said goods, at retail as aforesaid, said kegs of powder, and made no objection thereto, such renewal and extension thereof, under the circumstances, would amount to a waiver of said condition touching the keeping of gunpowder.

3. That if the jury should believe from the evidence, that before the time of the execution of the renewal and extension of the policy of insurance mentioned in the declaration, said defendant, through her duly authorized agent, had full notice of the execution and existence of said policy of insurance, issued by the Evansville Insurance Company, and yet that with such notice and without objection, defendant issued said renewal and extension and received and receipted for the premium therefor, the jury ought to regard this as a waiver, on the part of the defendant, of the said condition, touching the plaintiffs insuring said goods in other companies; and in such case the procuring by said plaintiffs of such insurance from the said Evansville Insurance Company, would be no defense to this action.

The questions suggested by the errors and relied upon, as may be inferred from the bill of exceptions, and the course of argument adopted by counsel for the plaintiffs in error, on the trial in the Circuit Court, may be briefly stated thus:

It is claimed on the part of the plaintiffs in error, that the evidence shows two distinct breaches of the conditions of the policy. 1. By the keeping of gunpowder in the stock of goods. 2. By taking additional insurance in the Evansville Insurance Company; and that by reason of these breaches the policy became void, and no recovery can be had thereon.

On the part of the defendant in error, it is admitted that the additional insurance was taken, and that the powder was kept upon the premises. But they say the insurance company is precluded from setting up these defenses. 1. As to the breach of the condition forbidding the keeping of gunpowder, because the agent of the company took the risk upon the stock, and *accepted the premium*, with a full knowledge that the powder was in the stock, and at the same

time gave his assent to the keeping of the same there till it should be sold out. 2. As to the breach of the conditions both as to keeping gunpowder and taking additional insurance, because, with full knowledge of the breach of these conditions and long afterwards, the insurance company by its duly authorized agent *accepted* the *premium* and *issued* an instrument renewing and continuing the policy in force for another year.

These *Two* positions are sustained by the *Three* instructions given by the Court, and which are assigned for error. And to show that the ruling of the Circuit Court is right, shall be our purpose in this argument.

And 1. As to the condition against keeping gunpowder. It is insisted that this condition is in the nature of a warranty, and that the breach of it, whether resulting in injury to the company or not, renders the policy void. But while we admit the correctness of the proposition in general terms, we shall have occasion after awhile to show that the word *void* is to be taken in a qualified sense.

If, then, this condition is in the nature of a warranty, it must be governed by the same rules as warranties; and if so in this case, the assured warranted to the insurer that there was no gunpowder upon the premises, and should not be any during the life-time of the policy; and the penalty to be incurred for a breach of this warranty was the loss of his remedy upon the policy, which he then received, and for which he paid his premium, at the same time both the assured and the insurer knowing that there *was* gunpowder upon the premises, and stipulating that it was to remain there. Clearly upon the principle of *warranty* a man is not bound by a warranty which binds him to the existence of a fact, the non-existence of which is known and assented to by him to whom the warranty is made. A warranty which is broken when made, and both parties know it, cannot upon any principle of law, or sound morals, be enforced in a court of justice. As well talk of enforcing a warranty that a horse is sound and fit for use, when he is seen by the parties to be lying dead.

Again, upon the principle of *estoppel*, the plaintiff in error is precluded from setting up this breach of condition.

Mr. Parsons defines an estoppel *in Pais* thus: "When a man has made a declaration or representation, or caused or in some cases not prevented a false impression, or done some significant act, with intent that others should rely and act thereon, and upon which others

have honestly relied and acted, he shall not be permitted to prove that the representation was false or the act unauthorized, or inefficient, if injury would accrue to the innocent party who had acted in full faith in its truth or validity." 2 Parsons on Cont., 793.

In the case at the bar, the insurer undertook to authorize the assured to keep gunpowder in their stock; and induced them *to pay the premium*, as the record shows; the assured honestly relied and acted upon this undertaking; as the sole and only ground upon which they paid the premium was that the policy was valid, which could only be so upon the ground that the waiver of this condition was effectual, and having received the benefit of the waiver as a valid and binding act, the underwriters cannot, under this authority, be permitted to say that this waiver was either *unauthorized* or *ineffectual* as against the assured, who have acted in full faith in its validity.

It may be answered that the attempt to waive the condition in the policy at the same time the contract of insurance was made, would infringe an elementary rule of evidence, and that to relieve the assured in such a case from the effect of the condition, would be to relieve them against a mistake of *law;* about the infringement of the elementary rule we shall speak more hereafter. But either is an exceedingly metaphysical argument; indeed, it is shadowy.

The case is this, Hemenway, the duly authorized agent of the company, goes to Spencer with his printed policy, and solicits his insurance, takes his money, and with a knowledge that there was, and would continue to be gunpowder on the premises, consents that it should be kept, delivers the policy and receives the premium therefor, *as a valid policy*, whereas he knows it is avoided the moment it is delivered; *Spencer receives the policy* and *pays his money believing it to be a valid policy*. (This is morally certain, otherwise he would not have paid his money.) Now, when the company have taken the premium and enjoyed the benefits, because the agent did not, as he ought to have done, indorse the permission to keep the gunpowder on, or insert it in the policy, they refuse to bear the burdens, and to pay the loss. And when Spencer says you got our money upon the faith that you were giving us a *valid policy*, you said by your acts that it was; we performed our part of the *contract* in *good faith;* we want our money. The company answer, true, we got your premium, we delivered you a policy with a condition

against keeping gunpowder, and we knew there was gunpowder there and *consented* to its staying there; we said the policy should be valid, and you thought so, but we cannot pay; the consent to let the powder remain was not reduced to writing, and therefore was not binding, and when you received your policy it was of no more value than *blank paper*. But Spencer answers, you took our money for *a valid policy*, you are *estopped* from *saying the policy was void*. But to this the company answer, to hold us estopped would be relieving you against a *mistake of law*, and would infringe an elementary rule of evidence.

But to all this we say, that to permit the company to take the premium as for a valid policy in such a case, and then, when it is sued on, to permit them to set up that it was void in its inception, on account of facts which then existed, and of which they knew and to which they assented, would be to tolerate the *grossest fraud*, and therefore the Court will hold them estopped without much refinement upon the question whether the assured are relieved from a contemplated fraud, resulting from a mistake of the law, or whether it arose from a mistake of fact, or whether an elementary technical rule of evidence may be strained into the support of the contemplated fraud.

The opinion of the court in the case of Bidwell vs. The Northwestern Insurance Company, (24 New York Reports, pp. 302, 304,) is very much in point here. Gould, J., delivering the opinion of the Court, (p. 304,) after showing that, under the parol evidence in the case, the property insured was not subject to the lien to which it was said to be subject, proceeds: "Indeed it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature) inserted in a policy, intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were not in accordance with the formal words of the contract or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that a warranty of the soundness of a horse that he has four legs, when one has been cut off."

So in Campbell vs. Merchants and Farmers Insurance Company, (37 N. H. Rep., p. 35,) an application was made by an agent who examined the premises, and the assured made and signed an application to the company, and the policy was issued. It was well known to the agent that there was a steam boiler upon the premises, but the same was not mentioned in the application made under the direction of the agent, and which purported to contain a full description of the premises. By the by-laws of the company, made part of the policy, it was void on account of the presence of the steam engine. But the Court held, there being no fraud, that the assured could not take advantage of the breach of a warranty against that which was known to the agent of the company; this case is, in principle, analogous to the one at bar.

Again, in the Protection Insurance Company vs. Haimer, (2 Ohio, N. S., p. 466,) Ranny, J., says: "But suppose the answer to the questions be construed as a warranty, still the law was laid down as favorable to the plaintiffs in error as some courts and judges would require. * * The statement as to the incumbrances was certainly untrue; but the agent of the underwriters was fully advised of all the facts; wrote the answers from his own knowledge, and would have stated it truly if the truth had occurred to him at the moment, without making the slightest difference in the terms of his insurance, while it does not appear that the agent of the assured knew anything about it. It is not doubted that this would be a perfect answer to a clause of warranty introduced into any contract, although it might be in writing. Schuyler vs. Russ, 2 Caine's Rep., p. 202; Long on Sales, 202. But it is claimed that a stipulation introduced into a contract of insurance cannot be restrained, and that parol evidence is not admissible to show such a state of facts. Many cases may be found to support the position, but those judges who have gone farthest, and applied it with most rigor, have been compelled to admit that no satisfactory reason can be assigned for the distinction. Jennings vs. Chenango Insurance Company, 2 Denio, p. 79, Jewett, J. On the other hand Ch. J. Nelson, in Turley vs. North American Insurance Company, 25 Wend., p. 374, in speaking of the contracts of insurance, expresses the opinion that "there is no more reason for claiming a strict literal compliance with its terms, than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against im-

position or fraud; beyond this, we would be sacrificing substance to form—following words rather than ideas." Stephens in his *Nisi Prius*, vol. 3, p. 2081, upon the authority of New Castle Insurance Company vs. M. Moran, 3 Dow, p. 255, says: "It seems that even in case of warranty, it would be a good answer that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agents." And finally the Supreme Court of Pennsylvania, in the case of Bruner vs. Howard Fire Insurance Company, determined during the present year, and not yet reported, has decided that "parol evidence is admissible to show that the description of property insured, annexed to a policy, though signed by the insured, was drawn up by the agents of the insurer, that they knew all about the property from verbal description by the insured and from actual survey; and that therefore, omissions and errors therein, were those of such agents and not to the insured, *notwithstanding a provision in the policy that the description should be taken as a part thereof and as a warranty on the part of the insured.*" 2 Am. Law Reg., p. 510—(23 Penn., 3 Harris, p. 50.) The case is better stated in the syllabus of the reporter than in the above quotation, thus: "Though it was provided in a policy of insurance that the conditions annexed were 'to be used and resorted to, to explain the rights and obligations of the parties,' in cases not specially provided for; yet, in an action by the assured on such a policy it was *held* that the assured might show the knowledge of the agents of the insurance company of the character of the property; that the description was as prepared by such agent; and that the omissions in the policy complained of by the company were made by him because he considered them immaterial; therefore the validity of the policy did not depend on the completeness of the written description." And this last clause comes fully up to the instructions we are endeavoring to sustain.

But as a case directly in point, we cite The Peoria Marine Insurance Company vs. Hall, 12 Michigan, p. 202:

In this case a policy of insurance was issued upon a stock of goods. The policy on its face purports to be "made and accepted in reference to the conditions thereunto annexed, which are to be resorted to in order to explain the rights and obligations of the parties in all cases not therein otherwise provided for." By one condition it is provided, that "the keeping of gunpowder or fire crackers, for sale

or on storage, upon or in the premises hereby insured, or in any building containing property insured by or under this policy, shall render it void and of no force or effect." Upon the trial in an action upon the policy, there was evidence tending to show that the agent of the defendant came to the store of the assured and wanted to insure the goods, that plaintiff told the agent he usually sold gunpowder and everything usually sold in a country store and that he intended to do so; and that keeping gunpowder was talked over between plaintiff and the agent; he was told plaintiff had gunpowder in the store, and the agent was asked if it made any difference, and he replied "*No.*"

The store and goods were burnt and the action was for the price of the goods. The court charges the jury: "That if the plaintiff informed the agent that he kept gunpowder in his store for sale and the agent intended to insure against keeping it, but neglected to endorse the permission upon the back of the policy, such neglect would not make the policy void."

Christiancy J., delivering the opinion of the court, says: "* * * * We think the plaintiff was entitled to a still stronger charge in his favor, he would have been entitled to a charge that if the agent knew the gunpowder was kept, and to be kept, the keeping it would not render the policy void, whether the permission was intended to be endorsed or not.

"But the counsel for the plaintiffs in error insist that the printed condition was notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that assent could only be given by the company itself. This at first would seem plausible, and might be sound but for another principle which lies at the back of it and defeats its application; the principle to which we allude is that notice to the agent is notice to the principal. The company must be regarded as knowing what he knows. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having knowledge also. They had power to waive the condition, and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition prohibiting its being kept.

"It would be a gross fraud in the company to receive the premium for issuing the policy on which they did not intend to be liable, and which they intended to treat as void in case of loss."

We are aware that there are authorities, which, to some extent, sustain the plaintiff in error, that go to the effect of holding, that though the company's agent, *duly authorized*, took the premium and assented to the keeping of the gunpowder, yet the company

may *accept the money* and then take *advantage of a warranty*, which they knew was broken when made, and treat the instrument as valid when they are receiving the premium, but void on account of a fact known to them at its delivery, when the assured attempts to enforce it. We say in the language of another: "Now between man and man, in any ordinary transaction of business, such an objection would create surprise, and, we should say it was unreasonable and untenable;" and we submit that such a fraud should not be tolerated by any court; because some other court, though failing to see upon what principle it was founded, had taken a distinction between this class of cases and ordinary cases of warranty or sale, or because such cases had not usually been classed among estoppels *in Pais*, notwithstanding they are within the spirit and are not distinguishable from them in principle.

The case in 2 Denio, 75, is one of the cases which seems to sustain the plaintiff in error, and the result reached by the enforcement of a rule, which the learned court attempts to sustain by the citation of authorities, attributing to policies of insurance the conclusive effect formerly given to instruments under seal, startles the learned judge delivering the opinion, as well it may; and having arrived at his conclusion, he says: "At the same time it cannot be denied that their application to this case operates with greater severity upon the plaintiff, and it is well calculated to lead to a serious doubt. * * * * * Here the mistake is proved to have been the result of ignorance, carelessness, or bad faith of the agent of the defendant."

And yet the plaintiff must be the victim of this ignorance, carelessness, or bad faith, to maintain a distinction for which the judge could give no reason. But this case is overruled both in New York and elsewhere, as we have endeavored to show and will show more fully hereafter.

To the same effect is the case of Barrett vs. The Union Mutual Life Insurance, 7 Cush, 175; see also to the same effect 13 Mass. 96, 172, and 14 Mass. 152; the latter being in principle identical with the case at bar.

But we insist that all these cases, and those following that line of decision, have been overruled by the more recent case above cited, and others which will now be noticed.

In Rowley vs. The Empire Insurance Co., 36 N. Y., 550, deci-

ded in March, 1867, Fullerton, J., delivering the opinion of the court, says: "If this court follows the decision in the case of Plumb vs. The Cataraugas County Mutual Insurance Company, 18 N. Y., 392, this judgment must be affirmed. That this case has changed the rule which has hitherto prevailed in this State, relating to warranties in policies of insurance, will be made apparent by a brief reference to it. In that case, one Ide, in making out the application for insurance, acted as the agent and surveyor of the company. It was proved that he called upon Henry, the assured, with a printed blank application and solicited him to effect an insurance with the defendant's company. Henry expressed a desire to postpone making the application, but told the agent, Ide, that if he insisted upon his taking the application that day, he must get along alone and act on his own responsibility. Ide then proceeded to make the survey alone; after he filled up the application and stated to Henry that it was all right, and just as it should be. Henry without any particular examination as to the statement of the distance between and the relative situation of the buildings, told Ide that upon his representation and statements he would sign, and thereupon did sign the application, and paid the premium. This testimany was objected to and taken under exception."

On the trial of the action brought upon the policy, the insurance company, under objection proved that there were material errors in the survey, as to the relative positions and distances of surrounding buildings, and gave testimony tending to show that the risk was increased thereby.

The judge of the circuit directed a verdict for the plaintiff, and, after affirmance by the general term, the judgment was appealed to this court, where it was held that the company was *estopped* from showing a breach of warranty as to the relative situation of the buildings.

This decision was put on the ground that the insurance agent, acting within the scope of his authority, bound the principal in making the survey and filling up the application, and consequently the company could not be permitted to show that the contract was other than the writing expressed.

Mr. Justice Pratt in delivering the opinion of the court, says: "But when the party through whose acts and representations the other party was induced to enter into the contract claims the right to show the facts were different from what he had represented them to be, for a purpose of showing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations. I cannot discover why the doctrine

of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of the doctrine of *estopped in pais*, as defined in the cases."

"It must be conceded that this case goes the whole length of establishing the doctrine that, although an application for insurance contains a false statement as to the material matter, the writing must still be held to express the contract between the parties, and that neither party can insist that the contract is other than what the writing expresses, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application while acting within the line of his duty." And the court in this case hold, that where the agent knew the condition of the property and filled the policy, but mis-stated the condition, that the company were estopped to take advantage of a breach of warranty arising upon the difference of the situation of the property from that represented in the application.

It is noticeable that this case expressly overrules 2 Denio, 75, and 13 Mass., 96 and 172, and 14 Mass., 152, the former of which is cited by the court in 7 Cush., (*Supra.*,) and all relied upon by the counsel in that case. And we direct special attention to the fact that the case in 14 Mass., is like the case at bar in principle. So that in New York at least, and indeed in all the more recent cases in all the States, the decisions favoring the position of the plaintiff in error have been overruled or relaxed. See Ayres vs. Hartford Fire Insurance Company, 17 Iowa, 176; Beale vs. Parke Insurance Company, 16 Wis., 241.

The tenor of all the modern cases is to protect the parties to contracts of insurance, like those to every other contract unprotected and not otherwise. That while insurance companies are permitted to use their skillfully devised conditions and provisions to protect themselves against fraud and imposition, they may be prevented from using them to practice fraud upon the unsuspicious and the confiding, in cases free from fraud or evil practice on the part of the assured; and to this end these courts relax rules, which when held inflexible, enable the underwriter to practice a fraud upon the assured, which is none the *less a fraud* by being called by the mild name of a *hardship*.

The rule as we deduce it, from the decided cases which we have cited and numerous others to the same effect, is, that where the underwriter examines the subject of insurance, and understands its

condition, and makes and delivers a policy and accepts the premium, there being no fraud or misrepresentations, it is not competent for him to void the policy on account of the breach of any warranty contained in the policy concerning the existence of any fact of which he had knowledge, and to the continuance of which he consented. Upon the principle of an *estoppel in pais*, against his alleging that the assured warranted against that which was known to exist by both parties, and that he paid his money for that which was known by both parties to be a void contract; for the obvious reason that underlies all *estoppels in pais*, that if the underwriter is allowed to take advantage of the breach of such a warranty it would operate as a fraud upon the assured; and it is gratifying to see that there is progress in this respect.

In 1846, the Court of Appeals of New York, speaking, by Judge Jewett, says, in substance: "The application of this severe inflexible rule (the rule that prevents relief in the case we have been discussing,) operates with *great severity*." While in 1867, the same court by Judge Fullerton, says in substance, "that to allow such a defense would be to tolerate a monstrous fraud, and therefore the company is *estopped to set it up*."

But there is another ground upon which the instructions of the Circuit Court can be justified; it is this, the policy is made to apply to both houses and goods; some of the conditions apply exclusively to houses and others to goods, and others to both; the subject of insurance, when goods or when either houses or goods are intended, when *property* is uniformly used in this instrument, but where reference is intended to the house, the word *premises* is used; for instance, the policy is avoided if the *premises* shall become vacant and remain so for twenty days; and so is the condition in reference to gunpowder; the language being that gunpowder * * * is kept on the *premises*, etc., clearly implying that the prohibition applies to cases of insurance upon the house, and as this policy is upon the goods the prohibition does not apply.

In Legget vs. Ætna Insurance Company, 10 Rich. Law, S. C., 202, this construction was given to similar language in a policy.

But suppose we should be wrong, and that we apply "*premises*" to the store in which the goods are kept for sale. Still the instruction of the court can be maintained upon another ground, consistently with principles well settled, and about which there is no

conflict of authority. In Phillips on Insurance, sec. 883, the author, discussing the ordinary condition in fire policies against strong "specified articles," says: "It has been held, that a reasonable quantity of the excepted article may be kept, where it is properly auxiliary, or usually belongs, to the business or use of the building expressly or impliedly permitted by the policy. As the keeping of a cask of oil and one of spirits, for retail purposes, in a building used as a grocery shop, the articles being usually a part of such stock, though they were specified as hazardous. Or keeping on hand spirituous liquors in quantity sufficient for boarders in the house, under the same condition. The same doctrine is held of keeping a small quantity of gunpowder in buildings insured as "stores."

The policy in the case at bar is upon the "stock of dry goods, hats and caps, boots and shoes, clothing, family groceries and queens-ware, and such articles as are usually kept in such houses," now it would, in order to apply this policy to its subject matter, have been clearly competent to prove that gunpowder was among the *articles usually kept* in such establishments, and it would have been competent to have embraced the gunpowder as part of the goods insured, it would have been equally competent by special enumeration and agreement of the parties, at the time of making the contract, and so gunpowder was specified as forming part of the stock.

It is hardly necessary to cite authorities to prove the competency of parol evidence to apply a policy of insurance to its subject matter, as the proposition is elementary. Parol testimony is admissible to establish the identity and *extent* of property covered by a policy of insurance. Root vs. Cincinnati Insurance Co., 1 Disn. Ohio, 138.

The condition in the policy forbids gunpowder, but the subject of insurance is groceries and such other articles as are usually kept. Under the authorities, the keeping of gunpowder for retail is not a breach, if gunpowder is usually kept, upon the presumption that that the description of the subject embracing the prohibited article is an *implied waiver* or qualification of the condition. Now where the description of the subject matter is not explicit, it is clearly competent to show that the grocery stock *did* embrace a small quantity of the prohibited article for sale, and that the parties ac-

cepted it as part of the subject of insurance embraced under the general description. This is in consonance with well recognized principles and is pointedly distinguishable from the cases of other insurance previously existing, and similar cases which we have already discussed.

In this view of the case it is much like the case of Bidwell vs. The North Western Insurance Co., 24 N. Y., 303, where it is said, citing 19 N. Y., 182, "That there is much greater latitude in applying a policy of insurance to the interest intended to be covered than in other written contracts."

We will now proceed to consider briefly the second position, whereby we propose to sustain the one assumed by the 2 and 3 instructions of the court, viz: That though the policy may have been void in its inception (in the ordinary sense of the term,) on account of the keeping of gunpowder, and although a second forfeiture was caused by the taking of additional insurance contrary to the terms of the policy; still by the renewal of the policy, the receipt of the premium and the issuing of the renewal receipt, the company waived the forfeiture.

Before discussing the effect of these acts of the insurance company, it might be well to look for a moment at the proper construction of the word *void*, as used in this class of contracts. It is a proposition which we will not controvert, that where a contract is void for want of power in the parties to make it, for illegality or other causes, whereby it is *absolutely* and *unconditionally* void, it is incapable of ratification. But on the other hand, we think it equally clear, that a provision in a policy of insurance rendering it void for breach of some condition, is analagous to a like provision in a lease. The breach of the condition renders the instrument voidable, perhaps more correctly speaking void, at the option of the underwriter. If he elects to claim the privilege of avoiding the instrument he may do so, and if he exercise his right to avail himself of the breach of condition, it is an absolute defense to an action on the policy. On the other hand, if the underwriter, with full knowledge of the breach of condition, treat the instrument as valid and induce the assured to expend money in the payment of premiums, this will operate as a waiver of the breach and validate the policy upon the principle of *estoppel in pais*.

A leading case upon this subject, and one resembling the case at

bar, so far as additional insurance is concerned, is Carroll vs. The Charter Oak Insurance Company, 38 Barb., p. 492. In that case it was sought to defend the action upon the policy, on the ground that additional insurance had been taken upon the goods in violation of the conditions of the policy; the evidence showed there, as here, that after the taking of the additional insurance, the company renewed the policy and accepted the premium therefor; and it was proposed to show by parol that at the time of renewal the company's agent was informed of the additional insurance but the evidence was excluded. The policy contained the following provisions: "And further, provided that in case the assured, or any other persons or parties interested, shall have already procured or shall hereafter procure any other policy of insurance or instrument purporting to be a policy of insurance against loss by fire, on the property or any part thereof hereby insured, (whether such instrument be valid or binding as a contract of insurance upon the parties thereto, or either of them, or not,) not notified to this corporation and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And that this policy is made and accepted upon and in reference to the application, plan, description or survey, filed in this office, and the terms and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereunto, in all cases not herein otherwise specially provided for, and this company will not be bound by any instrument, record, or statement not referred to or contained in this policy, and no condition of the policy can be waived except in writing, signed by the Secretary."

The opinion of the court being brief, we insert that portion of it which relates to the point under discussion, as follows:

"The plaintiff offered to show, that at the time when the agent of the defendants received the premium paid by the plaintiff's assignors for a renewal of their insurance, and in consideration thereof renewed the policy in suit for another year, he was notified of the policies issued by other companies which are now interposed as a defense.

"The authority of the agent to renew is not questioned. Indeed the case states that the policy was renewed by the defendants. It seems to me that the defendants having thus by an unequivocal act, declared the contract of insurance to be then valid, notwithstanding the other insurances, and having thereby induced the plaintiff's assignor to pay the premium for a renewal, must be deemed to have waived the forfeiture, if any had occurred by reason of the omission of the insured to give notice of the other insurances and have them endorsed on the policy. It certainly would be unjust to permit them now to assert, either that the renewal was inoperative, or that the policy became void immediately after it was renewed, by reason of the circumstances of which they were fully cognizant at the time of

renewal, and assuming the truth of the offer, I think they are precluded from doing so on the principle of *estoppel in pais*. (5 Denio, p. 154; 19 Barb., p. 440; 23 Conn. Rep., p. 224; 2 Amer. Lead. Cas., p. 625; 1 Phil. on Insurance, p. 586.)

"No question is entertained but that the provision of the policy which requires that notice be given of other insurances, and that they be mentioned in or endorsed upon the policy, is valid, and a breach of it renders the contract void. (Gilbert vs. The Phœnix Insurance Company, 36 Barb., p. 372, and cases cited on page 377.) But I understand the law to be, that a policy of insurance thus invalidated may be revived and rendered binding, by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding and with a full knowledge of the forfeiture, as is asserted by the editor of the *American Leading Cases*. 'The weight of authority, in modern times, seems to support the just and reasonable proposition, that a condition of avoidance or forfeiture should be construed as meant for the benefit or protection of the person in whose favor it is reserved, and as giving him the option of abrogating the contract, or of setting it up and insisting on its performance. (Vol. 2, pp. 624, 625, and cases there cited and commented upon: 25 Barb., 191, 220, *id.* 475, 5.)'

"The defendants insist that their acts do not amount to a waiver, by reason of the express provision of the policy that none of its conditions "can be waived, except in writing, signed by the secretary." But it was competent for the parties to rescind or modify this provision, by a valid agreement even in parol; and the *executed* agreement to renew the policy clearly had that effect. (7 Cowen, p. 48; 9 *id.*, p. 115.) 'The parties having thus mutually agreed to depart from the provisions of the policy, as to the manner in which a waiver of the forfeiture in question should be manifested, the rights of the insured under the new agreement should be protected, especially after it has been completely executed on their part.'" (2 Seld., 279.)

Again in 40 Barb., (p. 292,) the same case comes before the same Court, and the former opinion is adhered to, and the additional question of the power of an agent of the company to waive the condition without compliance with the stipulations in the policy, is raised and decided in favor of the power. Judge Smith closes the opinion of the Court in this case, thus: "The learned Judge was correct in charging the jury that if there was notice to the agent either at the time of taking the renewal receipt, *or* the payment of the renewal premium, the plaintiff will be entitled to recover; and in refusing to charge that if the jury should find that the notice, if any, was given after the renewal receipt was issued, although before the payment of the premium, still the policy was void.

The insured in paying the premium, dealt with the *defendants* through their agent, and not with the agent personally. He being

a general agent for effecting insurances on behalf of the company, had full power to insure, to renew and to receive notice of other insurances, and for aught that appears, was authorized to receive the premium when he did, and his acceptance of it, with notice of the breach, was as effectual a waiver of the breach as if the premium had been paid and he had accepted it with notice, at the time when the renewal receipt was issued."

Bevin vs. The Mutual Life Insurance Company, (23 Conn., p. 245,) was an action upon a life policy which contains a condition of forfeiture in case the assured went beyond certain limits. It appeared by parol evidence that at the time the policy was taken the assured told the agent of the underwriter that he should go beyond the prescribed limits, that he did so, and afterwards, with a full knowledge of the fact, the agent accepted two or three annual premiums and endorsed them on the policy. Held that by treating the instrument as valid and inducing the assured to expend his money for the annual premiums, with full knowledge of the breach of the condition, the company were estopped from relying upon such breach as a defense. Rathbone vs. The City Fire Insurance Company, (31 Conn., p. 193,) was an action for $200 on cider, containing a condition against hazardous articles in which, in the opinion of the Court, it is assumed wine is embraced; after the delivery of the policy, the agent endorsed thereon leave to remove the cider to another building, and afterwards endorsed a memorandum adding $100 to the amount insured on the cider and declaring the policy in force for $300. It appeared by parol proof, which was held to be competent, that the agent at the time of the removal of the cider, was fully informed as to the contents of the new building, and that there was *wine* stored therein, and that he consented to the removal, and made no objection on account of it. It was held: 1. That the policy with the endorsements was a *new* contract and a *new* risk. 2. Where some elements existed in the *new* risk which were *forbidden* by the original policy, and which were known to the company when the *new* risk was taken, their existence does not affect the validity of the new insurance.

The principle of these propositions fully sustains us here, both as to the keeping of gunpowder and taking additional insurance, and answers an argument used below and which may be repeated here, viz: that as the renewal put the policy in force, the condition against gunpowder was still in force, and was violated anew

after the renewal; but the last case cited refutes this position, besides the bill of exceptions here leaves it uncertain whether there was any gunpowder after the renewal. See 38 Barb. *Supra*.

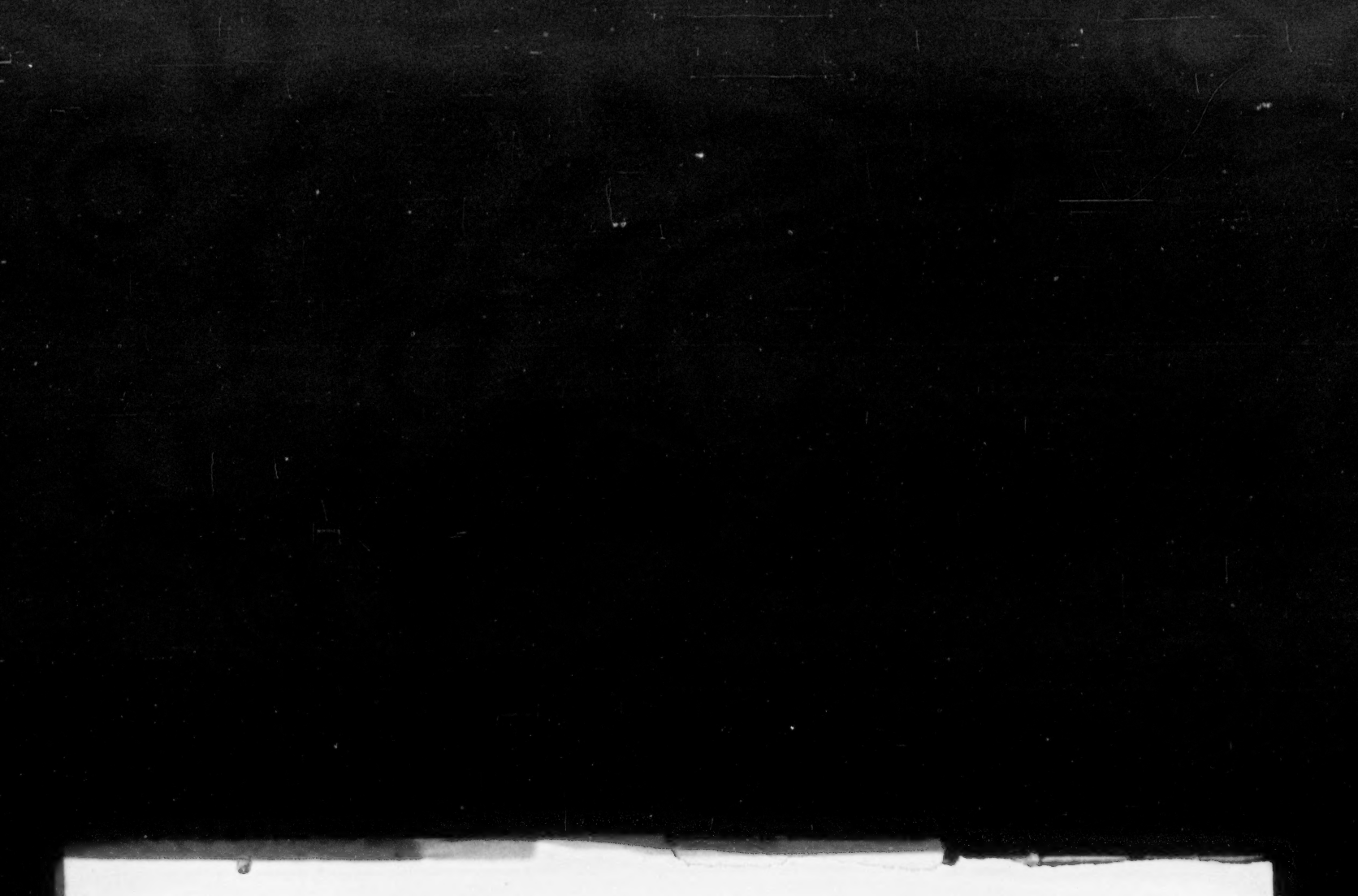
Upon this point, see also North Berwick Co. vs. Insurance Company, 52 Maine, 336; New York Insurance Co. vs. National Protection Insurance Co., 20 Barb., 468; Liddle vs. Market Fire Insurance Co., 29 N. Y., 184; Ames vs. New York Union Insurance Co., 26 N. Y., 263; Boshen vs. Washington Insurance Co., 35 N. Y., 131; Coit vs. National Protection Insurance Co., 25 Barb, 189; Viall vs. Genessee Mutual Insurance Co., 19 Barb., 446; Frost vs. Saratoga Mutual Insurance Co., 5 Den., 154; Lycoming Mutual Insurance Co. vs. Storkbower, 26 Penn st., 199; Wing vs. Harvey, 27 Eng. Law and Eq., 140.

We apprehend the power or authority of the agent will not be questioned, as each of the instructions assumes that the agent "*was duly authorized.*" But if it be necessary, in addition to the cases we have already referred to, in most of which, the authority of the agent to bind the company in such cases has either been assumed or discussed and sustained, we cite Story on Agency, sec. 126, 134; 23 Wend., 260; 1 Comst., 290, 36 N. Y., 550; 18 id., 392; 26 id., 465; and for an exhaustive examination of all the bearings of our second proposition, we refer to the Germania Insurance Co. vs. Viele, Iowa Reports, decided October term, 1868; probably not yet reported.

So, then, if our second proposition be true, it is of little consequence whether the first is or not. The plaintiff in error claims to have had a right of defense upon two grounds: 1. The breach by keeping gunpowder. 2. By taking additional insurance. We have two answers, one, the waiver of the company and the assent given at the time of the issuing of the policy; that is an answer only to one breach. But suppose it is not a sufficient answer, then our second answer applies to both breaches, and is a conclusive answer. Hemenway, who issued the policy, knew of the gunpowder, and afterwards himself, upon his own motion, issued a policy upon the same goods in the Evansville Company. Then Hemenway, the same agent, knowing of the gunpowder, and of the additional insurance, afterwards renewed the policy, accepted the premium and issued the renewal receipts; all this appears in the record; and upon principle, and authority without conflict,

this is a complete answer to both breaches. And the inquiry is, suppose the court should be of opinion that the first instruction is erroneous, still the error being an entirely harmless one, will the court reverse the case? We submit that it will not. The instruction simply misdirected the jury on one point, which was rendered unimportant by other evidence in the case, which applied to the same point as well as another.

But, it may be asked, how it appears in the record that the jury were not misled by the first instruction. We answer, because the same evidence which would sustain a verdict under the first, second and third, would sustain one under the second and third. There is absolutely no difference, either in law or in logic. Under the instructions there could have been no verdict for the plaintiffs, unless the facts assumed in the third instruction were true, and if they were, then the facts assumed in the second, and not embraced in the third, and those in the first were practically alike, so that the first instruction, if erroneous, is entirely harmless, and of course will not justify a reversal. But, for the reasons we have given, we still insist that all the instructions were properly given and ought to be sustained.

For all these reasons we ask an affirmance of the judgment, with damages and costs.

JAMES HUGHES,
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